Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22–1110 OF 2005
NIK HASMAT J
18 FEBRUARY 2013

Contract — Damages — Building contract — Parties entered into sales and purchase agreement to purchase condominium units — Hand over of vacant possession together with water and electricity ready for connection, failing which, purchaser entitled to liquidated damages — Developer ceased all construction works after completing 30% of works — Whether developer in breach of contractual obligation — Whether purchasers entitled to damages under sales and purchase agreement

The plaintiffs and the defendant entered a sales and purchase agreement ('SPA') to purchase from the defendant, condominium units ('the VP'). By virtue of cl 22(1) of the SPA, the defendant agreed to hand over vacant possession of the VP to the plaintiffs within 36 months from the date of the SPA together with water and electricity ready for connection failing which, pursuant to cl 22(2) of the SPA, the plaintiffs were immediately entitled to liquidated damages, to be calculated daily at the rate of 10% pa of the purchase price. The defendant was further obligated to hand over the completed units of the VP equipped with common facilities within the stipulated 36 months failing which, pursuant to cl 24(2) of the SPA, the defendant was to pay the plaintiffs liquidated damages. Despite the plaintiffs' continuous payments, the defendant ceased all construction works after completing 30% of the works and failed to complete the construction and deliver vacant possession as promised. Instead, the defendant commenced and completed another project and the plaintiffs were informed that pursuant to s 176 of the Companies Act 1965, the defendant's holding company had undertaken and embarked on a corporate restructuring exercise which involved and included financial restructuring scheme for the potential revival of the VP project. The plaintiffs were subsequently offered refund of all monies paid but the plaintiffs declined and instead claimed that they had suffered losses and damages as a result of the defendant's contractual breach of obligation pursuant to the SPA. The plaintiffs claimed against the defendant for damages, specific performance of the SPA, special damages, general and/or exemplary damages.

Held, allowing the claim with costs of RM40,000:

(1) Pursuant to the clear provision of cl 22(1) and of the SPA, it was clear that as the developer, the defendant was contractually obligated to the

plaintiffs to complete the construction and deliver vacant possession to the plaintiffs together with the common facilities with water and electricity ready for connection within 36 months from the respective dates of the SPA. It was evidently undisputed, that the defendant had ceased construction works on the project at 30% completion stage. The defendant was clearly in breach of their contractual obligation pursuant to the terms of the SPA in their failure to complete the construction and deliver vacant possession (see paras 20–21).

(2) Despite the plaintiffs' undisputed apparent continuous readiness and capability to complete the SPA, the defendant was not equally ready or capable to execute the same. This was a fit and proper case not to grant the plaintiffs' claim for specific performance of the SPA. Damages were more appropriate a remedy to address the plaintiffs' grievance and loss. The plaintiffs' action was primarily premised on the defendant's breach of contractual obligation, namely to complete the construction of the VP and deliver vacant possession to the plaintiffs (see para 37).

(3) The court could not find any reason for the defendant's appeal against the court's award of damages to the plaintiffs. In view of the length of the court proceeding which had involved five hearing days, five plaintiffs' witnesses and three defendant's witnesses, the costs of RM40,000 to the plaintiffs was, justifiable, fair and reasonable (see para 50).

[Bahasa Malaysia summary

Plaintif-plaintif dan defendan memasuki perjanjian jual dan beli ('SPA') untuk membeli daripada defendan, unit-unit pangsapuri ('VP'). Mengikut klausa 22(1) SPA, defendan bersetuju untuk memberikan milikan kosong VP kepada plaintif-plaintif dalam masa 36 bulan dari tarikh SPA bersama air dan elektrik siap dipasang, jika gagal, berikutan klausa 22(2) SPA, plaintif-plaintif dengan serta-merta berhak untuk ganti rugi yang ditetapkan, dikira secara harian pada kadar 10% setahun ke atas harga pembelian tersebut. Defendan selanjutnya bertanggungjawab untuk memberi unit-unit VP yang siap dilengkapi dengan kemudahan biasa dalam masa 36 bulan yang ditetapkan tersebut jika gagal, berikutan klausa 24(2) SPA, defendan dikehendaki membayar plaintif-plaintif ganti rugi yang ditetapkan. Meskipun, plaintif-plaintif terus membayar, defendan memberhentikan kesemua kerja pembinaan selepas menyiapkan 30% daripada kerja-kerja tersebut dan gagal untuk menyiapkan pembinaan dan memberikan milikan kosong seperti yang dijanjikan. Sebaliknya, defendan memulakan dan menyiapkan projek lain dan plaintif-plaintif diberitahu bahawa berikutan s 176 Akta Syarikat 1965, syarikat induk defendan telah menjalankan dan memulakan penyusunan semula korporat yang mana melibatkan dan termasuk skim penyusunan kewangan untuk pemulihan potensi projek VP. Plaintif-plaintif kemudiannya ditawarkan bayaran balik semua wang yang dibayar tetapi plaintif-plaintif menolak dan sebaliknya menuntut bahawa mereka telah menanggung kehilangan dan

kerugian akibat kemungkiran kontrak tanggungjawab defendan berikutan dengan SPA. Plaintif-plaintif menuntut terhadap defendan untuk ganti rugi, pelaksanaan spesifik SPA, ganti rugi khas, am dan/atau ganti rugi teladan.

Diputuskan, membenarkan tuntutan dengan kos sebanyak RM40,000:

(1) Berikutan peruntukan jelas klausa 22(1) dan SPA, adalah jelas bahawa sebagai pemaju, defendan bertanggungjawab secara kontrak kepada plaintif-plaintif untuk menyiapkan pembinaan dan memberi milikan kosong kepada plaintif-plaintif bersama dengan kemudahan-kemudahan biasa dengan air dan elektrik siap dipasang dalam masa 36 bulan dari tarikh masing-masing SPA. Adalah jelas, bahawa defendan telah memberhentikan kerja-kerja pembinaan ke atas projek yang telah siap sebanyak 30%. Defendan jelas memungkiri tanggungjawab kontrak mereka berikutan terma-terma SPA dalam kegagalan mereka untuk menyiapkan pembinaan tersebut dan memberi milikan kosong (lihat perenggan 20–21).

(2) Meskipun persediaan berterusan dan keupayaan yang jelas plaintif-plaintif yang tidak dipertikaikan untuk menyempurnakan SPA tersebut, defendan tidak secara sama bersedia atau berkebolehan untuk melaksanakannya. Ini adalah kes yang jelas dan betul untuk tidak memberikan tuntutan plaintif-plaintif untuk pelaksanaan spesifik SPA. Ganti rugi adalah lebih wajar untuk mengatasi ketidakpuasan hati dan kerugian plaintif-plaintif. Tindakan plaintif-plaintif secara utamanya berdasarkan ke atas kemungkiran tanggungjawab kontrak defendan, terutamanya untuk menyiapkan pembinaan VP dan memberikan milikan kosong kepada plaintif-plaintif (lihat perenggan 37).

(3) Mahkamah tidak mendapati apa-apa alasan untuk rayuan defendan terhadap award ganti rugi mahkamah kepada plaintif-plaintif. Mengambil kira prosiding mahkamah yang panjang yang melibatkan lima hari pendengaran, lima saksi-saksi plaintif-plaintif dan tiga saksi defendan, kos RM40,000 kepada plaintif-plaintif adalah berjustifikasi, adil dan munasabah (lihat perenggan 50).]

Notes

For cases on building contract, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3945–3947.

Cases referred to

Datuk Jagindar Singh & Ors v Tara Rajaratnam [1986] 1 MLJ 105; [1985] 1 LNS 157, PC (refd)

Ocean Tramp Tankers Corporation v V/O Sovfracht [1964] 1 All ER 161, CA (refd)

A *Zaibun Sa binti Syed Ahmad v Loh Koon Moy & Anor* [1982] 2 MLJ 92; [1982] CLJ 457, PC (refd)

Legislation referred to

Companies Act 1965 s 176

B Specific Relief Act 1950 ss 18, 28

R Thayalan (Armadas with him) (R Thayalan & Co) for the plaintiffs.
Mohamad Izral Khairi (LL Woon with him) (Izral Partnership) for the defendant.

C **Nik Hasmat J:**

FACTUAL BACKGROUND

[1] Pursuant to the sales and purchase agreement entered between the
D defendant and the first plaintiff, second and third plaintiffs jointly, the fourth plaintiff, fifth and sixth plaintiffs jointly and the seventh plaintiff respectively dated 9 December 1996, 9 December 1996, 13 November, 27 November 1996 and 13 November 1996 ('the SPA'), the plaintiffs agreed to purchase from the defendant, Villa Perhentian Condominium at the respective purchase
E prices of RM196,660, RM199,660, RM189,460, RM185,460 and RM189,460 ('the VP').

[2] In accordance with cl 22(1) of the SPA, the defendant agreed to hand over vacant possession of the VP to the plaintiffs within 36 months from the
F date of the plaintiffs' respective SPAs together with water and electricity ready for connection failing which, pursuant to cl 22(2) of the SPA, the plaintiffs were immediately entitled to liquidated damages, to be calculated daily at the rate of 10%pa of the purchase price. The defendant was further obligated to hand over the completed units of the VP equipped with common facilities
G within the stipulated 36 months failing which pursuant to cl 24(2) of the SPA, the defendant was to pay the plaintiffs liquidated damages to be calculated daily at the rate of 10%pa on the last 20% of the purchase price.

[3] Despite the plaintiffs' continuous payment to the defendant's progress
H payment claims, the defendant ceased all construction works on the VP end January 1998 after completing 30% of the construction works on the project. By the project completion date in December 1999, the defendant failed to complete the construction and deliver vacant possession of the VP to the plaintiffs. The defendant instead in place of the VP, commenced and
I completed construction at the same location of the VP, a new condominium project known as the Saffron.

[4] During the material period of the project suspension, the plaintiffs were informed that pursuant to s 176 of the Companies Act 1965, the defendant's

holding company, Taiping Consolidated Sdn Bhd had undertaken and embarked on a corporate restructuring exercise which involved and included financial restructuring scheme for the potential revival of the VP project. The plaintiffs were subsequently offered refund of all monies paid by the plaintiffs to the defendant towards the purchase of the VP which however, were declined by the plaintiffs. The plaintiffs' payment towards the purchase price of the property were for the amount of RM58,998, RM59,698, RM56,838, RM55,638, RM56,834 respectively paid by the first plaintiff, second and third plaintiffs jointly, the fourth plaintiff, the fifth and sixth plaintiffs jointly, and the seventh plaintiff.

[5] Despite the plaintiffs' continuous readiness to complete the sale and purchase transaction, the defendant failed to complete the construction of the VP and, deliver the vacant possession of the same. Up to the institution of the plaintiffs' suit dated 21 September 2005, the defendant had continuously neglected and, failed to hand over the VP to the plaintiffs, pursuant to the terms of the SPA. The plaintiffs thus claimed that plaintiffs had suffered losses and damages as a result of the defendant's contractual breach of obligation pursuant to the SPA.

THE PLAINTIFFS' CLAIM

[6] Pursuant to para 30 of the plaintiffs' statement of claim, the plaintiffs' claim against the defendant are as follows:

(a) specific performance and/or damages in lieu thereof;

(b) special damages;

(c) general damages and/or exemplary damages in the sum of RM350,000 to each of the plaintiffs (the second and third plaintiffs jointly and, the fifth and sixth plaintiffs jointly);

(d) interest at a rate to be determined by the court;

(e) costs of the action; and

(f) any such further relief as may be just and equitable in the circumstances.

COURT JUDGMENT

[7] On the evidence adduced before this court and on a balance of probabilities, the plaintiffs have succeeded to prove plaintiffs' cause of action against the defendant. Pursuant to cll 22(2) and 24(2) of the SPA, the defendant was found to be liable to the plaintiffs for the breach of defendant's

contractual obligation, to complete the construction and hand over vacant possession of the VP to the plaintiffs within the contractually agreed time.

[8] The court accordingly allowed the plaintiffs' claim for damages for an amount of RM120,000 as per para 30(1) of the plaintiffs' statement of claim against each plaintiff (the second and third plaintiffs and the fifth and sixth plaintiffs jointly), with interest at the rate of 4% from the filing of the plaintiffs' cause of action on 21 September 2005 to the date of judgment on 29 May 2012. The plaintiffs' claim is allowed with costs of RM40,000. The plaintiffs' payment towards the purchase price of the VP was ordered to be refunded by the defendant.

[9] The plaintiffs' claim for specific performance of the SPA, special damages, general and/or exemplary damages for the sum of RM350,000 for each of the plaintiffs, the second and third plaintiffs jointly, and the fifth and sixth plaintiffs jointly, as respectively prayed in para 30(1)–(3) of the plaintiffs' statement of claim were disallowed by the court.

The plaintiffs and the defendant's appeal

[10] The plaintiffs' appeal is in respect of the court order which disallowed the plaintiffs' claim for specific performance, general, special and exemplary damages. The defendant is appealing against the court's award of damages in favour of the plaintiffs for the amount of RM120,000 costs, and interest on the damages.

THE PLAINTIFFS' CASE

[11] Pursuant to the clear terms of the SPA, the defendant was contractually obligated to complete the construction and deliver vacant possession of the VP to the plaintiffs. The plaintiffs have fully paid the defendant's claimed sum for progress payments up to 30% of the project construction works and the plaintiffs' payments were based on the defendant's contractual representation that the VP would be completed and duly delivered to the plaintiffs.

[12] The defendant's issuance of notices of demand for payments, imposition of late interest and, the defendant's continuous acceptance of the plaintiffs payment in respect of the defendant's progressive billing invoices, had conferred on the plaintiffs a reasonable and legitimate expectation that the defendant was able to complete and hand over to the plaintiffs the promised units in accordance with defendant's representation in the SPA.

[13] The plaintiffs have consistently declined the defendant's offers of settlement including offer of refund of monies that had been paid by the

plaintiffs towards the purchase of the property. The plaintiffs claimed specific performance of the SPA and, maintained their continued willingness and readiness to conclude the plaintiffs contractual obligation contained therein.

[14] The plaintiffs further disputed the defendant's reason for failing to complete the construction of the VP which had been purportedly attributed to the global economic crisis of 1997–1998. The plaintiffs claimed that the defendant had constructed at the same location of the VP a higher end condominium development project known as the Saffron, which the defendant for added premium had subsequently, in 2006 launched and sold to the public at higher prices from that of the VP ranging from RM200,000–RM300,000.

THE DEFENDANT'S CONTENTION

[15] The defendant attributed their failure to complete the construction of the VP to the global economic crisis of 1997/1998 which resulted in the defendant's suspension of construction works on the VP and, frustrated the defendant's continued development of the Sentul Raya project and further execution of the SPA.

[16] During the material period of suspension, the defendant had however offered to refund the plaintiffs and the remaining purchasers of the VP, all monies paid towards the purchase of the VP and, had further offered alternative units from the defendant's other development, at discounted prices.

[17] The defendant disputed the plaintiffs' assertion of continued readiness, willingness and ability to complete 'the said SPA' as there was no evidence in court of plaintiffs' financial capability to settle the remaining balance sum of the purchase price.

[18] The defendant contended that the plaintiffs had failed to discharge their burden of proof in the plaintiffs' claim for specific performance as only the second, third, fifth and sixth plaintiffs had secured loan financing in 1998 towards the purchase of the VP. The defendant further contended that in view of the plaintiffs' failure to prove entitlement to specific performance of the SPA, the court should not exercise its discretion to award damages in lieu of the relief of specific performance.

[19] The defendant denied the plaintiffs' claim that the defendant had replaced the VP project with the Saffron. the Saffron was only launched by the defendant in 2006, after the plaintiffs' institution of this court action on 21 September 2005. The defendant further contend that the plaintiffs had effectively abandoned the plaintiffs' claim for specific performance as no court

proceeding was instituted to restrain or prohibit the defendant from proceeding with the defendant's new project development.

GROUNDS OF JUDGMENT

The defendant's breach of the SPA

[20] Pursuant to the clear provision of cll 22(1) and 24(1) of the SPA, it was clear that the defendant as the developer, was contractually obligated to the plaintiffs to complete the construction and deliver to the plaintiffs vacant possession of the VP together with the common facilities with water and electricity ready for connection within 36 months from the respective dates of the SPA.

[21] It was evidently undisputed, that the defendant had ceased construction works on the project as early as January 1998. At the material time of the defendant's cessation, construction works on the VP had merely attained 30% completion stage. As of the project's scheduled completion date in December 1999 and as at the material date of the plaintiffs' institution of this court action, the defendant was clearly in breach of their contractual obligation pursuant to the terms of the SPA in the defendant's failure to complete the construction and, deliver vacant possession of the VP to the plaintiffs.

[22] By way of notices of demand dated 3 October 2001 issued to the second to seventh plaintiffs, the defendant demanded from the plaintiffs, third progress payment to be paid within 14 days from the date of notice, failing which the SPA would be treated as repudiated. The defendant's notices of demand were issued in pursuant to cl 9(2) of the SPA. In compliance with the defendant's demand, the respective plaintiffs duly paid the defendant the third progress payment for the amount claimed by the defendant.

[23] Upon receipt of the defendant's claim, the first plaintiff made immediate payment for the defendant's third progressive claim. The second and third plaintiffs made the required payment, for the sum of RM19,966 on 16 October 2001 vide Cheque No 489708, the fourth plaintiff paid RM18,946 on 10 October 2001 vide Malayan Banking Bhd's Cheque No 080058, the fifth and sixth plaintiffs paid RM18,546 vide Cashiers Order No 027075 whilst the seventh plaintiff made payment on 10 October 2001 vide Southern Bank cashier's order for the sum of RM18,946 dated 10 October 2001. It was therefore proven that all of the defendant's claims for progress billings up to the three stage of construction have been fully settled by the plaintiffs. PW1, the seventh plaintiff who gave evidence on behalf of the plaintiffs, had confirmed in his testimony in court that the defendant had issued progress billing invoice to him vide progress billing Invoice

No P110005533 for the payment of third ground work for car park and his sister, the fourth plaintiff vide Invoice No P110005534 for the respective amount of RM18,946. PW1 further confirmed in court that the defendant had accepted their respective payment of RM18,946 each being third progress payment towards purchase price of the VP.

[24] In the light of clear evidentiary proof of the plaintiffs' third progress payment to the defendant's claimed sum, the defendant's dispute of receipt of third progress payment from the second to seventh plaintiffs, was clearly an afterthought and, without merit. Further, there was no evidence adduced in court supporting the defendant's contention of the plaintiffs' uncashed cheques and uncashed cashier's order, or its return to the plaintiffs.

[25] Therefore the plaintiffs' payment towards the defendant's progressive claims up to the third stage of the project was clearly proven. The plaintiffs have paid 30% of the purchase price of the VP and have fully settled all sums as were claimed by the defendant. PW1 further confirmed that pursuant to the plaintiffs' third progress payment, the defendant had again requested the plaintiffs to reconsider the defendant's offer of refund to the plaintiffs.

[26] The defendant's repeated issuance of progressive billings, interest advice for late payment charges, notices of demand for the plaintiffs' payment be made within 14 days from the notice and, the plaintiffs' undisputed payment to the defendant's claim, had conferred reasonable and legitimate expectation on the plaintiffs of the defendant's ability to perform and fulfill their contractual obligation in accordance with the terms of the SPA. The plaintiffs were thus accordingly justified in their reliance on the defendant's clear and unequivocal representation of due deliverance of the VP.

[27] Despite the defendant's creation of a legitimate expectation on the plaintiffs that the VP would be completed and handed over as were agreed, the defendant however failed to alert or inform the plaintiffs of the defendant's inability to complete the project. The plaintiffs were merely verbally informed that the project would be scrapped and that in the event the defendant company was wound up, the long period of the plaintiffs would lose their investment. During the defendant's long period of suspension of the project works, the defendant did not notify nor alert the plaintiffs of the defendant's intended abandonment of the VP project. The defendant's correspondences to the plaintiffs which contained offers of refund of the plaintiffs' monies dated 11 August 2000, 18 August 2000, and as late as 26 July 2002 and 12 August 2002, did not contain any notification that the project would not be completed. The defendant had merely informed the plaintiffs that in the event the defendant's offer were not accepted, the plaintiffs were entitled to pursue appropriate remedies deemed fit by the plaintiffs.

[28] Upon cessation of the construction development on the VP, the defendant had instead replaced the construction of the the VP with the development of a new project, the Saffron condominium. In this respect, the court is in agreement with the plaintiffs' submission that the defence of frustration is not available to the defendant. An agreement is frustrated upon the occurrence of an event which renders its performance radically different from what was undertaken by the contract. Although the economic crisis of 1997–1998 could render the defendant's continued execution of the SPA less viable, commercially, the crisis was not proven to have frustrated the defendant's continued performance of the SPA. The economic crisis was not sufficient to bring about a frustration and, at best merely rendered the defendant's performance of contractual obligation more onerous and more expensive for the defendant to continue than what was originally contemplated in the contract. In this regard, Lord Denning MR in *Ocean Tramp Tankers Corporation v V/O Sovfracht* [1964] 1 All ER 161 at p 166 explained the doctrine of frustration:

> To see if the doctrine applies, you have first to construe the contract and see whether the parties themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, than you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be positively unjust to hold the parties bound. It is often difficult to draw the line, but it must be done, and it is for the courts to do it as a matter of law.

[29] The economic crisis clearly did not frustrate the defendant's further execution of construction works as notwithstanding the crisis, the defendant to their benefit and apparent advantage, was able to replace the VP condominium development with a revised high end condominium development which clearly would have yielded the defendant added monetary return. There is therefore no merit in the defendant's contention that the global economic crisis of 1997–1998 had effectively frustrated the defendant's further performance of contractual obligation pursuant to the SPA.

THE PLAINTIFFS ENTITLEMENT TO CLAIM FOR SPECIFIC PERFORMANCE OF THE SPA

[30] The plaintiffs were clearly found by the court to be ready, willing and financially capable, of continuous performance of parties' respective contractual obligation in accordance with the SPA. As purchasers of defendant's property, the plaintiffs could not be faulted and were not guilty of any lapses or failing in the performance of their contractual obligation. Despite

the defendant's continuous offers of refund of the plaintiffs' monies and offer of alternative units, the plaintiffs had consistently and persistently, continued to refuse all of the defendant's offers.

[31] The plaintiffs were further proven to be materially ready to perform and conclude the plaintiffs' entire obligation pursuant to the SPA. The second, third, fifth and sixth plaintiffs had successfully obtained financiers' approval for the purchase of their respective units. It was manifestly clear to the court that at all material times, the plaintiffs were willing and capable of performing the plaintiffs' obligation pursuant to the SPA. In considering whether or not the plaintiffs were entitled to the relief of specific performance, the court took into consideration plaintiffs' consistent and steadfast claim for the specific performance of the SPA from the time of the defendant's default right up to the conclusion of the trial. The plaintiffs had never by conduct or otherwise, abandoned the plaintiffs' claim.

[32] However, it was also clear that despite the project completion date of December 1999, up to the material date of plaintiffs' institution of the court suit dated 21 September 2005, the defendant's project had remained largely, uncompleted. Given the stage of completion of the project which had merely attained 30% at the material time of the defendants cessation of construction works, and given the ensuing substantial termination of the SPA by the majority of its purchasers, it must be apparent to any reasonable and fair minded person that the plaintiffs' persistent and adamant insistence for specific performance of the SPA and, delivery of vacant possession of the property was, but a futile quest. The court accordingly disallowed the plaintiffs' claim for specific performance of the SPA and, in lieu, allowed damages as prayed in para 30(1) of the plaintiffs' statement of claim.

THE PLAINTIFFS ENTITLEMENT TO DAMAGES IN LIEU OF SPECIFIC PERFORMANCE

[33] The court was of the view that given the peculiarity and special circumstances of the case, damages was a more appropriate remedy to address the plaintiffs' grievance and loss. The plaintiffs' action was primarily premised on the defendant's breach of contractual obligation, namely to complete the construction of the VP and deliver vacant possession to the plaintiffs. In the case of *Zaibun Sa binti Syed Ahmad v Loh Koon Moy & Anor* [1982] 2 MLJ 92; [1982] CLJ 457, it was established that a claim for specific performance of an agreement and an alternative claim for damages for the breach of contract constitute a perfectly usual claim. In this regard, the court noted that from the inception of the case, the plaintiffs had consistently maintained the plaintiffs' claims for both reliefs, specific performance of the SPA and, alternative claim for damages. There was clearly no inconsistency in sustaining both claims for

specific performance and, seeking damages in lieu of specific performance. The defendant had contended that pursuant to s 28 of the Specific Relief Act 1950, the plaintiffs' alternative claim for special or general damages ought to be rejected by the court and that the plaintiffs were not entitled to the award of damages if the action for specific performance was disallowed. Section 28 of the Specific Relief Act 1950 provides as follows:

> The dismissal of a suit for specific performance of a contract or part thereof shall bar the Plaintiffs' right to sue for compensation for the breach of the contract or part, as the case may be.

[34] In this regard however, based on the provision of s 18 of the Specific Relief Act 1950 the granting of both reliefs either in addition to, or in substitution of the relief for specific performance is permitted. Section 18 provides as follows:

> 18 Power to award compensation in certain cases
>
> (1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to or in substitution for, its performance.
>
> (2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which had been broken by the defendant and that the plaintiff is entitled in compensation for that breach, it shall award him compensation accordingly.

[35] The defendant's abortion of the VP had spanned a duration of seven years, and the possibility of the revival of the aborted project befitting the specification and description specified in the SPA was, extremely remote. The defendant had completed a relatively nominal stage of project construction at the material time of the defendant's of the project and, the majority of the purchasers of the VP had terminated their SPA. The construction of the VP was thus indefinitely suspended and severely halted for a considerable period. At the material time of the plaintiffs' suit, the defendant's replacement project, the Saffron was nearing completion and, about to be launched. The plaintiffs were further found to have paid a relatively nominal fraction of the total purchase price of the VP. In the light of the substantial termination of the SPA by the majority of the purchasers as early as 2001–2002, the futility of the plaintiffs' insistence on the specific performance of the SPA reasonably ought to have been within the plaintiffs' contemplation.

[36] Further, despite the plaintiffs' insistence for specific performance of the SPA, no actions were found to have been taken by the plaintiffs to restrain or prohibit the development of the defendant's 'revised' project, the Saffron, launched in 2006, at about the same time as the plaintiffs' filing of suit on

21 September 2005. By way of the plaintiffs' solicitor's notice of demand dated 20 September 2005, the plaintiffs' had threatened the defendant with legal action, specific performance, and injunctive reliefs. However, in their claim against the defendant, the plaintiffs had merely prayed for specific performance, special, and exemplary damages. The plaintiffs did not seek to restrain or prohibit the defendant's construction works on the new development project, the Saffron nor its subsequent launch and disposal to the public.

[37] Therefore, despite the plaintiffs' undisputed apparent continuous readiness and capability to complete the SPA, the glaring reality on the ground was that, the defendant unlike the plaintiffs was not equally ready or capable to execute the same. The court, having regard to the facts and surrounding circumstances of this case, finds that this is a fit and proper case not to grant the plaintiffs' claim for specific performance of the SPA and, accordingly in lieu of specific performance awarded the plaintiffs, compensatory damages for the stated sum of RM120,000 against each SPA.

GROUNDS AGAINST THE DEFENDANT'S APPEAL

[38] The court's award of damages was decided upon due deliberation of parties' submission, evidence before the court and case authorities regarding the same. Evidence had been unchallenged that if the defendant had continued the project into completion, the plaintiffs would have been in possession of the VP and, would have benefitted in the increased value as of the date of the court judgment. In the case of *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1986] 1 MLJ 105; [1985] 1 LNS 157 it was held:

> The object of damages for the tort of deceit as for other torts, is to put the injured party into as good a position financially as he would have been in if the tort had not been committed. So, in Their Lordships' opinion the learned trial judge was right in principle to take into account in the assessment of damages the value which the land, if the respondent had not been deprived of it, would have borne at the date of judgment.

[39] The plaintiffs' computation of damages were essentially premised on the differential sum between the market value of the VP had the project been completed as of the VP was pegged against the market value of the Saffron which, according to an estate valuer's valuation PW3, was stated to be RM497,000. PW3 admitted that for the purpose of the valuation, PW3 was instructed by the plaintiffs to assess the value of the VP according to the market value of the Saffron.

[40] In this regard, it was clear that the plaintiffs' contention that the VP was

never aborted but was instead, revived, completed, renamed and re-launched as the Saffron, was a mere unsubstantiated, assertion devoid of any evidentiary proof. the Saffron development was clearly an entirely different project development from that of the VP and, was subjected to different contractual terms from that of the VP including, different description, specification and, purchase prices.

[41] Therefore, although the Saffron was constructed and developed by the defendant and, sited at the location of the VP, it was for all intent and purposes an entirely different condominium development product from what parties had contracted for pursuant to the SPA and accordingly, the plaintiffs' calculation of damages against the market value of the Saffron was, clearly, misconceived.

[42] In awarding the stated amount, the court further deliberated and included the following consideration namely, the defendant's clear liability to pay the plaintiffs liquidated ascertained damages according to the calculation provided in cll 22(2) and 24(2) of the SPA. In this regard, the plaintiffs had claimed liquidated ascertained damages on the amount, on the car park for the respective sum of RM233,405.86, RM46,680.47 against the first plaintiff, RM236,966.17, RM47,393.23 as against the second and third plaintiffs, RM224,860.84, RM49,971.93 as against the fouth plaintiff, RM220,112.96, RM44,022.36 as against the fifth and sixth plaintiffs and RM224,860.84, RM44,971.93 as against the seventh plaintiff. The plaintiffs had further claimed RM300,000 as loss of profit and exemplary damages of RM350,000. In the absence of evidentiary proof of the plaintiffs' damages and losses, the plaintiffs' submission on loss of profit for the amount of RM300,000 for each unit, based on the differential sum between the market price of the VP and the purchase price stated in the SPA and, the plaintiffs' claim for exemplary damages for the amount of RM350,000 constitute a bare claim and, was clearly unsubstantiated.

[43] It was undisputed that the plaintiffs were legally entitled to liquidated ascertained damages pursuant to cll 22(2) and 24(2) of the SPA. However, during the long period of the defendant's abandonment of works on the VP, it would have been apparent to the plaintiffs of the defendant's inevitable and imminent abandonment of the project. The court deliberated over the plaintiffs' underlying reason for continuous insistence and claim for specific performance of the SPA in the light of defendant's stark and clear abortion of the VP.

[44] At the material time of the plaintiffs' institution of this court suit, the defendant's replacement project, the Saffron which was launched in 2006, would have been nearing completion, which therefore render the plaintiffs'

insistence for the specific performance of the SPA, futile. In view of the defendant's clear inability to continue their contractual obligation, as early as 2001–2002 when the defendant's offers of refund were effected to the VP purchasers, the plaintiffs accordingly owe a duty to mitigate the plaintiffs' losses. The plaintiffs should not, as was submitted by the defendant, under the guise of keeping the SPA alive be allowed to benefit continuously and indefinitely from the defendant's clear contractual liability to pay the plaintiffs, liquidated ascertained damages pursuant to the calculation provided in the SPA.

[45] Accordingly, the court in lieu of specific performance, awarded damages in favour of the plaintiffs for the amount of RM120,000. The court further ordered the defendant to refund to the respective plaintiffs all payments made towards the purchase of the VP for the respective amount of RM58,998.00, RM59,898, RM56,838, RM55,638 and RM55,838. The stated damages awarded is considered, a fair and reasonable sum as against the plaintiffs' claim for general, exemplary damage of RM350,000 and, special damages of RM300,000, being the plaintiffs' loss of profit.

[46] As regards the defendant's appeal against the court's award of RM120,000 as damages, interest and costs, given the peculiarities of the case, the court considers the award for the stated amount a fair and reasonable judgment sum.

[47] The plaintiffs were undisputedly, legally entitled to the liquidated ascertained damages according to the calculation provided in cll 22(2) and 24(2) of the SPA. However, notwithstanding the prescribed calculation, guided by the consideration as outlined in paras 9.6–9.7 of the above, the court deliberated other relevant considerations in the computation of the damages for the stated amount. The vacant possession of the VP was to be handed over to the plaintiffs within 36 months from the date of the plaintiffs' respective SPAs, namely by December 1999. However as early as January 1998, the defendant had ceased construction works and, by 2001–2002, 80% of the purchasers of the VP accepted the defendant's offer of refund (of monies) and, had terminated their SPAs. The defendant's subsequent construction of the revised project the Saffron was completed and subsequently launched and sold to the public in 2006 which therefore render the plaintiffs' steadfast and unyielding insistence for the project completion, unreasonable and unrealistic. Given the stark and glaring reality of the defendant's inevitable project incompletion, it would be unjust and inequitable for the court to award damages for the amount as were prayed by the plaintiffs.

[48] In granting damages for the stated amount, the court took into consideration that despite the defendant's claim of economic woes which had

purportedly frustrated the defendant's further performance of the SPA, the defendant however, ingeniously and surreptitiously managed to conceptualise, and complete the construction development of the defendant's revised project, the Saffron which as clearly evident from its sale prices, yielded considerably higher profit to the defendant.

CONCLUSION

[49] On the evidence adduced and on a balance of probabilities, the defendant was found to be in clear breach of the SPA. The court allowed the plaintiffs' claim for damages as prayed in para 30(1)(1) of the plaintiffs' statement of claim for the amount of RM120,000 and, accordingly disallowed the plaintiffs' claim for specific performance of the SPA, special damages, general and/or exemplary damages respectively prayed in para 30(1)–(3) of the plaintiffs' statement of claim.

[50] Having considered the above, the court could not find any reason for the defendant's appeal against the court's award of damages to the plaintiffs for the stated sum of RM120,000, interest at the rate of 4% from the date of the filing of the plaintiffs' action until judgment date and, costs of RM40,000. In view of the length of the court proceeding which had involved five hearing days, five plaintiffs' witnesses and the three defendant's witnesses, the costs of RM40,000 to the plaintiffs was, justifiable, fair and reasonable.

Claim allowed with costs of RM40,000.

Reported by Afiq Mohamad Noor